IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RANDOLPH DALEY **8313 Burlington Drive** **North Ridgeville, Ohio 44039,** **Plaintiff** **vs.** **CITY OF CLEVELAND** **601 Lakeside Avenue** **Cleveland, Ohio 44114** **MICHAEL McGRATH** **Individually and in his Official** **Former Capacity as Chief of Police,** **Cleveland Police Department** **1300 Ontario Street** **Cleveland, Ohio 44113** **MARTIN FLASK** **Individually and in his Official** **Former Capacity as Director,** **Department of Public Safety** **City of Cleveland** **601 Lakeside Avenue, Room 230** **Cleveland, Ohio 44114** **and** **JOHN AND/OR JANE DOES #1-10** **Unknown Police Officer, Agent and** **Employee of the City of** **Cleveland, Both Individually** **and in their Official Capacity** **1300 Ontario Street** **Cleveland, Ohio 44114** **Defendants**	)	**CASE NO.** **JUDGE** **COMPLAINT** **(Jury Demand Endorsed Hereon)**

Now comes Plaintiff RANDOLPH DALEY, by and through undersigned counsel; and, for his Complaint, states as follows:

I. Jurisdiction

1. Jurisdiction over claims brought under the Fifth and Fourteenth Amendments to the United States Constitution as well as 42 U.S.C. § 1983 is conferred on this Court by 28 U.S.C. §§1331, 1343 (a) (3) and (4). This court has supplemental jurisdiction over state law claims pursuant to 28 U.S.C. 1367 (a).

II. Venue

2. This Court is the proper venue under 28 U.S.C. §1391(b), this being the District in which the events giving rise to Plaintiff's claims occurred with jurisdiction granted pursuant to 28 U.S.C. §1331 and §1343.

III. The Parties

3. Plaintiff RANDOLPH DALEY, at all times relevant herein, is an employee of the City of Cleveland within its Police Department, which conducts its operations in the City of Cleveland, County of Cuyahoga, and State of Ohio.

4. Defendant City of Cleveland (hereinafter "City") is a unit of local government organized under the laws of the State of Ohio. The City is a person under 42 U.S.C. §1983 and, at all times relevant herein, acted under color of law.

5. Defendant City employed agents, servants and employees, including Defendants Martin Flask (hereinafter "Flask"), and John and/or Jane Does, Agents and Employees, for purposes of, among other things, maintaining a police department and safety force, delivering care to the public, and for keeping order and law; and any said

acts by said agents, servants and employees were within the course and scope of their employment and authority and in furtherance of protective affairs of said Defendant City.

6. Defendant City's Police Department employed agents, servants and employees, including Defendant Michael McGrath (hereinafter "McGrath"), and John and/or Jane Doe Officers, Agents and Employees, for purposes of maintaining a police and safety force, delivering care to the public, for keeping order and law; and any said acts by said agents, servants and employees were within the course and scope of their employment and authority and in furtherance of protective affairs of said Defendant City.

7. Defendant McGrath, at all times relevant, was employed by the City of Cleveland as its Chief of Police and any actions of Defendant McGrath taken were done in furtherance of the objectives of the City, including retaining Plaintiff as an employee of the Cleveland Police Department, considering whether or not to promote Plaintiff to the rank of Lieutenant in the Cleveland Police Department, and keeping order and law.

8. Defendant Flask, at all times relevant, was employed by the City of Cleveland as its Director of Public Safety and any actions of Defendant Flask taken were done in furtherance of the objectives of the City, including retaining Plaintiff as an employee of the Cleveland Police Department, considering whether or not to promote Plaintiff to the rank of Lieutenant in the Cleveland Police Department, and keeping order and law.

9. John and/or Jane Does, at all times relevant, were employed by the City of Cleveland and any actions of Defendant John and/or Jane Does were done in furtherance of the objectives of the City to provide care to the public, including retaining Plaintiff as an employee of the Cleveland Police Department, considering whether or not to promote Plaintiff within the ranks of the Cleveland Police Department, and keeping order and law.

IV. Facts

10. Plaintiff is an employee of the City of Cleveland's Police Department, where he has held employment since on or about September 28th, 1998.

11. Plaintiff is currently employed at the rank of Sergeant.

12. In the organizational structure of the City of Cleveland's Police Department, the rank of Lieutenant is one rank higher than that of Sergeant.

13. Those employed by the City of Cleveland's Police Department at the rank of Sergeant receive lower pay per hour than do those employed at the rank of Lieutenant.

14. To become eligible for a promotion from the rank of Sergeant to that of Lieutenant, a Sergeant must sit for a Lieutenant's Civil Service Examination.

15. When a position of Lieutenant becomes available, the past practice and de facto policy of the City of Cleveland's Police Department is to promote to the rank of Lieutenant the Sergeant with the highest score on the Lieutenant's Civil Service Examination.

16. As the past practice and de facto policy of the Defendant City's Police Department is to promote to the rank of Lieutenant the Sergeant with the highest score on the Lieutenant's Civil Service Examination, it has waived any right it has to promote to the rank of Lieutenant based on criteria other than the Sergeant with the highest score on the Lieutenant's Civil Service Examination.

17. On or about July 23rd, 2011, Plaintiff sat for a Lieutenant's Civil Service Examination conducted by the Defendant City's Police Department for those who sought a promotion to the rank of Lieutenant.

18. On or about January 13th, 2012, the results of the Lieutenant's Civil Service Examination were certified and Plaintiff was notified that he received a score of 100.83011 and, furthermore, received the tenth (10th) highest score among the fifty (50) individuals who took the examination.

19. The results of the exam administered on or about July 23rd, 2011, were to be utilized when selecting candidates for promotion to the rank of Sergeant through January 13, 2014.

20. On or about March 2nd, 2012, the Sergeants with the first (1st) through fourth (4th) highest scores on the Lieutenant's Civil Service Examination were promoted to the rank of Lieutenant.

21. On or about March 29th, 2012, Plaintiff received a letter from Defendant Flask informing him that he was eligible for promotion to the rank of Lieutenant and requesting that he indicate if he wished to be considered for such a promotion.

22. Plaintiff, upon receiving the March 29th, 2012, letter from Defendant Flask, informed him that he would like to be considered for such a promotion.

23. On or about March 21st, 2013, the Sergeants with the fifth (5th) and sixth (6th) highest scores on the Lieutenant's Civil Service Examination were promoted to the rank of Lieutenant.

24. On or about April 25th, 2013, Plaintiff received a letter from Defendant Flask informing him that he was eligible for promotion to the rank of Lieutenant and requesting that he indicate if he wished to be considered for such a promotion.

25. Plaintiff, upon receiving the April 25th, 2013, letter from Defendant Flask, informed him that he would like to be considered for such a promotion.

26. On or about May 23rd, 2013, Defendant Flask sent a letter to Brian Betley, President of Fraternal Order of Police Lodge #8, the bargaining unit for Plaintiff. Said letter stated that effective June 3rd, 2013, "notwithstanding past practice . . . I will exercise the one-in-three rule when determining the most qualified candidate for a vacancy."

27. On or about July 29th, 2013, Plaintiff received a letter from Defendant Flask informing him that he was eligible for promotion to the rank of Lieutenant and requesting that he indicate if he wished to be considered for such a promotion.

28. Plaintiff, upon receiving the July 29th, 2013, letter from Defendant Flask, informed him that he would like to be considered for such a promotion.

29. On or about August 26th, 2013, the Sergeant with the seventh (7th) highest score on the Lieutenant's Civil Service Examination was passed over and the Sergeant with the eighth (8th) highest score was promoted to the rank of Lieutenant.

30. On or about October 7th, 2013, Plaintiff received a letter from Defendant Flask informing him that he was eligible for promotion to the rank of Lieutenant and requesting that he indicate if he wished to be considered for such a promotion.

31. Plaintiff, upon receiving the October 7th, 2013, letter from Defendant Flask, informed him that he would like to be considered for such a promotion.

32. On or about November 4th, 2013, the Sergeants with the ninth (9th) and eleventh (11th) highest scores on the Lieutenant's Civil Service Examination were promoted to the rank of Lieutenant and Plaintiff was skipped over for said promotion despite obtaining a higher score than one (1) of the two (2) individuals receiving said promotion.

33. On or about November 4th, 2013, a Sergeant other than Plaintiff was promoted to the rank of Lieutenant by Defendants City, McGrath, Flask, and John/Jane Does #1-10 despite the fact that Plaintiff had a higher score on the Lieutenant's Civil Service Examination than the Sergeant that was promoted. This action was in contravention of the past practice of the Cleveland Police Department for the promotion of Sergeants to the rank of Lieutenant.

34. Prior to the November 4th, 2013, promotion of a Sergeant other than Plaintiff to the position of Lieutenant, Plaintiff was not provided with notice and an opportunity to be heard regarding the Lieutenant position in the City of Cleveland's Police Department despite his property interest in the same.

35. Following the November 4th, 2013, promotion of a Sergeant other than Plaintiff to the position of Lieutenant, Plaintiff was not provided with notice and an opportunity to be heard regarding the Lieutenant position in the City of Cleveland's Police Department despite his property interest in the same.

36. On or about November 15th, 2013, Plaintiff received a letter from Defendant Flask informing him that he was eligible for promotion to the rank of Lieutenant and requesting that he indicate if he wished to be considered for such a promotion.

37. Plaintiff, upon receiving the November 15th, 2013, letter from Defendant Flask, informed him that he would like to be considered for such a promotion.

38. On or about December 20th, 2013, the Sergeants with the thirteenth (13th)[1], fourteenth (14th), and fifteenth (15th) highest scores on the Lieutenant's Civil Service Examination were promoted to the rank of Lieutenant.

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[1] Of note, the individual with the twelfth (12th) highest score on the Civil Service Exam had on a prior date left the employ of the City of Cleveland's Police Department.

39. On or about December 20th, 2013, three (3) Sergeants other than Plaintiff were promoted to the rank of Lieutenant by Defendants City, McGrath, Flask, and John/Jane Does #1-10 despite the fact that Plaintiff had a higher score on the Lieutenant's Civil Service Examination than the three (3) Sergeants that were promoted. This action was in contravention of the past practice of the Cleveland Police Department for the promotion of Sergeants to the rank of Lieutenant.

40. Prior to the December 20th, 2013, promotion of a Sergeant other than Plaintiff to the position of Lieutenant, Plaintiff was not provided with notice and an opportunity to be heard regarding the Lieutenant position in the City of Cleveland's Police Department despite his property interest in the same.

41. Following the December 20th, 2013, promotions of Sergeants other than Plaintiff to the position of Lieutenant, Plaintiff was not provided with notice and an opportunity to be heard regarding the Lieutenant position in the City of Cleveland's Police Department despite his property interest in the same

42. Following this second instance in which Plaintiff was passed over for promotion by other Sergeants who scored lower on the Lieutenant's Civil Service Examination and otherwise were less qualified for the promotion, Plaintiff's name was then removed from the list of those individuals eligible to receive a promotion to the rank of Lieutenant.

43. Plaintiff remains an employee of the Cleveland Police Department in the rank of Sergeant, receiving less in pay and benefits than other employees of the Cleveland Police Department that were not as qualified to receive a promotion to the rank of Lieutenant and did not score as high on the Lieutenant's Civil Service Examination.

44. Following Defendants' passing over Plaintiff for promotion to the rank of Lieutenant despite his property interest in the same, Plaintiff filed a grievance through his labor union on December 13th, 2013.

45. After taking the grievances through all applicable steps of the grievance procedure, the Plaintiff's labor union requested that the grievance be taken to arbitration on March 10th, 2015.

46. Prior to the arbitration hearing, Defendant City of Cleveland filed a complaint for preliminary and permanent injunction and declaratory judgment on August 20th, 2014, arguing that Defendant City of Cleveland's failure to promote Plaintiff was not arbitrable.

47. On August 27th, 2015, in City of Cleveland v. Fraternal Order of Police, Lodge #8, Cuyahoga County Court of Common Pleas, Case No. CV-14-831531, that court granted Defendant City of Cleveland's request and enjoined Plaintiff's labor union from arbitrating the matter of the denial of Plaintiff's promotion.

48. Plaintiff cannot receive the promotion through a petition to the City of Cleveland's Civil Service Commission despite his property interest in said promotion because the Civil Service Commission does not have the power to promote within the ranks of the City of Cleveland's Police Department and, furthermore, Plaintiff takes issue with Defendants' failure to properly take the results into account and does not take issue with the results of the examination.

49. Plaintiff cannot receive the promotion through a request for injunctive relief because the harm he has suffered is not immediate and irreparable, as he can be made whole by a promotion as well as an award of back pay and benefits.

50. Plaintiff has no other adequate state law remedy or method for obtaining the promotion to the rank of Lieutenant despite his property interest in the same.

V. Count I: Violation of Plaintiff's Procedural Due Process Rights: All Defendants

51. Plaintiff re-alleges and incorporates herein by reference the allegations contained in paragraphs 1 through 50 as fully written herein.

52. The past practice and de facto policy of the Defendants City, McGrath, Flask, and John/Jane Does #1-10 was to promote to the rank of Lieutenant those at the rank of Sergeant with the highest score on the Lieutenant's Civil Service Examination.

53. Plaintiff, as the recipient of a higher score on the Lieutenant's Civil Service Examination than other Sergeants eligible to receive a promotion to the rank of Lieutenant on November 4, 2013, had a protected property interest in the opening for the Lieutenant position, given the policies and past practices of the Defendant City's Police Department.

54. Despite Plaintiff's protected property interest in the opening for the Lieutenant position, Defendants the City, McGrath, Flask, and John/Jane Doe #1-10 promoted to said position alternate candidates who scored lower on the Lieutenant's Civil Service Examination on or about November 4, 2013, infringing on Plaintiff's protected property interest in said position.

55. Prior to the November 4th, 2013, promotion of a Sergeant other than Plaintiff to the position of Lieutenant, Plaintiff was not provided with notice and an opportunity to be heard regarding the Lieutenant position in the City of Cleveland's Police Department despite his property interest in the same.

56. Following the November 4th, 2013, promotion of a Sergeant other than Plaintiff to the position of Lieutenant, Plaintiff was not provided with notice and an opportunity to be heard regarding the Lieutenant position in the City of Cleveland's Police Department despite his property interest in the same.

57. Plaintiff, as the recipient of the highest score on the Lieutenant's Civil Service Examination of those Sergeants eligible to receive a promotion to the rank of Lieutenant on December 20, 2013, had a protected property interest in the opening for the Lieutenant position, given the policies and past practices of the Defendant City's Police Department.

58. Despite Plaintiff's protected property interest in the opening for the Lieutenant position, Defendants the City, McGrath, Flask, and John/Jane Doe #1-10's promoted to said position alternate candidates who scored lower on the Lieutenant's Civil Service Examination on or about December 20, 2013, infringing on Plaintiff's protected property interest in said position.

59. Prior to the December 20th, 2013, promotion of a Sergeant other than Plaintiff to the position of Lieutenant, Plaintiff was not provided with notice and an opportunity to be heard regarding the Lieutenant position in the City of Cleveland's Police Department despite his property interest in the same.

60. Following the December 20th, 2013, promotions of Sergeants other than Plaintiff to the position of Lieutenant, Plaintiff was not provided with notice and an opportunity to be heard regarding the Lieutenant position in the City of Cleveland's Police Department despite his property interest in the same.

61. Plaintiff was rendered ineligible for promotion to the rank of Lieutenant following Defendants the City, McGrath, Flask, and John/Jane Doe #1-10's decision to pass over him for promotion to the rank of Lieutenant on the above-referenced occasions.

62. Defendants have, under color of state law, deprived Plaintiff of his rights under the Fifth and Fourteenth Amendments when they deprived him of property without due process by failing to promote him to the rank of Lieutenant, causing him to suffer monetary damages and emotional distress.

63. Plaintiff would not have suffered monetary damages but for Defendants' violation of rights under the Fifth and Fourteenth Amendments when they failed to promote him to the rank of Lieutenant, in violation of the past practices and policy of Defendant City's Police Department.

64. As a direct and proximate result of Defendants' actions, Plaintiff's constitutional rights to due process have been violated and he has sustained and will continue to sustain monetary damages into the future, and will continue to suffer from emotional distress into the future.

65. There is no state law remedy available to Plaintiff for Defendants the City, McGrath, Flask, and John/Jane Doe #1-10's decision to pass over him for promotion to the rank of Lieutenant on the above-referenced occasions.

66. Defendants the City, McGrath, Flask, and John/Jane Doe #1-10's acted negligently, recklessly, wantonly, willfully, knowingly, intentionally and with deliberate indifference to the Fifth and Fourteenth Amendment rights of Plaintiff when they failed to promote him to the rank of Lieutenant despite the fact that he was the most qualified candidate for the open position on November 4th, 2013, and on December 20th, 2013.

VI. Count II: Petition for Writ of Mandamus: All Defendants

67. Plaintiff re-alleges and incorporates herein by reference the allegations contained in paragraphs 1 through 66 as fully written herein.

68. Plaintiff, as the recipient of a higher score on the Lieutenant's Civil Service Examination than other Sergeants that instead received said promotion to the rank of Lieutenant on November 4th, 2013, had a clear legal right to a promotion to the rank of Lieutenant

69. Defendants the City, McGrath, Flask, and John/Jane Doe #1-10 had a clear legal duty to promote Plaintiff to the rank of Lieutenant on November 4th, 2013, as Plaintiff had a higher test score than other individuals who were promoted instead, as since at least 1995, Defendants always promoted the Sergeant with the higher score on the civil service exam to the position of Lieutenant.

70. Plaintiff, as the recipient of a higher score on the Lieutenant's Civil Service Examination than other Sergeants that instead received said promotion to the rank of Lieutenant on December 20th, 2013, had a clear legal right to a promotion to the rank of Lieutenant

71. Defendants the City, McGrath, Flask, and John/Jane Doe #1-10 had a clear legal duty to promote Plaintiff to the rank of Lieutenant on December 20th, 2013, as Plaintiff had a higher test score than other individuals who were promoted instead, as since at least 1995, Defendants always promoted the sergeant with the higher score on the civil service exam to the position of Lieutenant.

72. There is no plain and adequate at law remedy available to Plaintiff for Defendants the City, McGrath, Flask, and John/Jane Doe #1-10's decision to pass over him for promotion to the rank of Lieutenant on the above-referenced occasions.

73. Plaintiff would not have suffered monetary damages but for Defendants' failure to promote him to the rank of Lieutenant, in violation of the past practices and policy of Defendant City's Police Department.

74. As a direct and proximate result of Defendants' actions, Plaintiff has sustained and will continue to sustain monetary damages into the future, and will continue to suffer from emotional distress into the future.

VII. Count III: Breach of Contract:
All Defendants

75. Plaintiff re-alleges and incorporates herein by reference the allegations contained in paragraphs 1 through 74 as fully written herein.

76. Defendants, by offering a civil service examination and promoting to the rank of Lieutenant those Sergeants with the highest score on said examination since at least 1995, entered into a contract with Sergeants like Plaintiff whereby upon a vacancy in the rank of Lieutenant, the Sergeant with the highest score on the civil service examination would receive said promotion.

77. Sergeants, and in this instance Plaintiff, accepted Defendants' offer by expending the time and cost necessary to sit for the civil service examination and later expressing their interest in promotion to the rank of Lieutenant when they were asked if they would like to be considered for said promotion.

78. Defendants breached their contract with Plaintiff on November 4, 2013, and again on December 20, 2013, when they passed over him for promotion to the rank of

Lieutenant and instead selected Sergeants that did not score as high on the civil service examination.

79. As a direct and proximate result of Defendants' actions, Plaintiff has sustained and will continue to sustain monetary damages into the future, and will continue to suffer from emotional distress into the future.

VIII. Count IV: Declaratory Judgment:
All Defendants

80. Plaintiff re-alleges and incorporates herein by reference the allegations contained in paragraphs 1 through 79 as fully written herein.

81. In the alternative, the purpose of Declaratory Judgment Act, O.R.C. 2721, is to "afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. It is remedial in nature and is to be liberally construed and administered."

82. Pursuant to the Declaratory Judgment Act, O.R.C. 2721.03, "any person . . . whose rights, status, or other legal relations are affected by a . . . statute or rule . . . (to) have determined any question of construction . . . arising under such . . . statute (or) rule . . . and obtain a declaration of rights, status, other legal relations thereunder."

83. A real controversy between Plaintiff and Defendants exist, as Plaintiff has been denied a promotion to the rank of Lieutenant despite his property interest in the same and Defendants deny any such interest.

84. This controversy is justiciable in character, as this court has the ability to order Defendants to promote Plaintiff to the rank of Lieutenant.

85. Speedy relief is necessary for the rights of Plaintiff that may be otherwise lost or impaired, as Plaintiff is presently receiving less pay than he is entitled to and is furthermore, precluded from obtaining subsequent promotions for which is he qualified.

86. Plaintiff requests that this Honorable Court issue a declaratory judgment that Plaintiff has been deprived of his property interest in a promotion to the rank of Lieutenant and, furthermore, order Defendants to promote Plaintiff to the rank of Lieutenant and order back pay to be paid to Plaintiff in the amount of the difference between what Plaintiff earned since the time he was first passed over for promotion on November 15th, 2013, and what he would have earned, had he been promoted to the rank of Lieutenant on November 15th, 2013.

IX. Prayer for Relief

WHEREFORE, Plaintiff RANDOLPH DALEY demands judgment against Defendants City of Cleveland; Michael McGrath, Individually and in his Official Capacity as Former Police Chief, Martin Flask, Individually and in his Official Capacity as Former Director of Public Safety, City of Cleveland, and John and/or Jane Doe #s 1 - 10, Unknown Police Officers, Agents and Employees of the City of Cleveland, Individually and in their Official Capacities, jointly and severally, as follows:

1. Past and future economic and non-economic compensatory damages, consequential damages, liquidated damages, incidental damages, lost pay, back pay, future pay and lost benefits;
2. Punitive damages for each party in an amount to be determined at trial;
3. Reasonable attorney's and expert fees;
4. Interest and costs of this action; and
5. Declaratory judgment in the form of a promotion to the rank of Lieutenant.
6. Any other relief which this Court deems just and equitable.

Respectfully submitted,

/s/ Michael G. Polito___________________________
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JURY DEMAND

Plaintiff RANDOLPH DALEY hereby demands a trial by jury consisting of the maximum number of jurors permitted by law as to all triable issues in this action.

/s/ Michael G. Polito___________________________
MICHAEL G. POLITO
One of the Attorneys for Plaintiff